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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 6

AL HARRIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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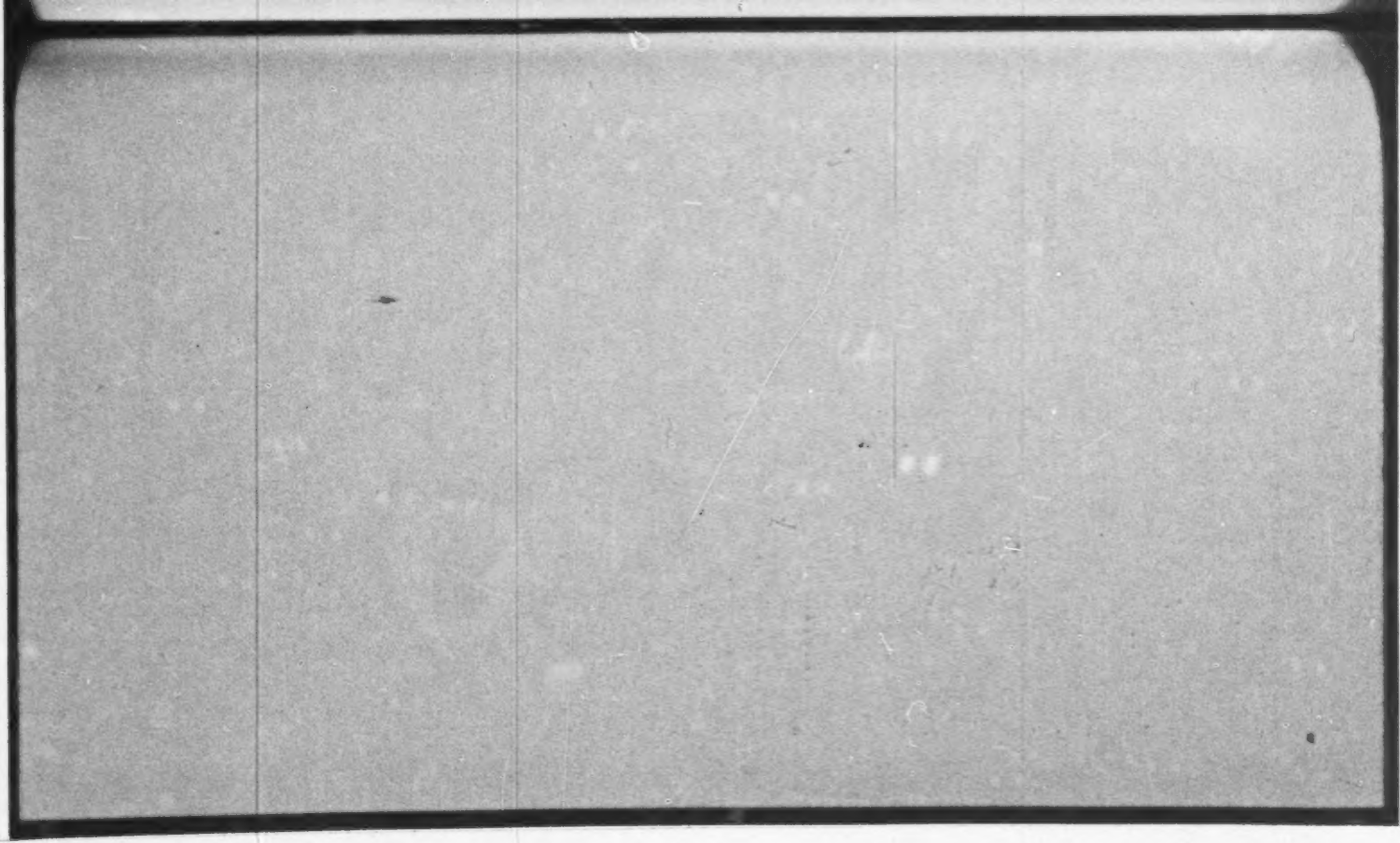

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REPLY BRIEF FOR THE PETITIONER

Petitioner's principal arguments are set forth in full in his Brief. This Reply Brief is devoted to answering several points raised in the Brief for the United States.

1. The government recognizes that the proceedings in the instant case *could* have been pursuant to Rule 42(b).

At page 19 of its brief, the government states: "A
ing as we do that the court could have chosen to pr
under subsection b with regard to petitioner's out-of
contempt, it selected a permissible alternative." Th
ernment is arguing in essence that although Rule 42
proper, the prosecutor and the court in this case ought
able to avoid its clear mandate and use Rule 42(a), r
upon this Court's earlier ruling in *Brown* v. *U. S.* J
Stewart acknowledged in the *Brown* case that Rule
may be a proper alternative. Therefore, this case pos
basic question: is the need for speed so great as to out
the requested procedural protections of the Consti
and of the statute to notice and hearing, especially
sentences that are imposed are severe? This is th
question, and it is urged that this Court rule tha
balance, life in the courts could go on with short dela
that defendants can have reasonable hearings before
are jailed for long periods.

The government in its brief on page 22 states th
the *Levine* case this Court held that the contempt
the contempt in the instant case) was committed i
presence of the court. Petitioner agrees that the adj
tions of contempt were similar in *Levine* and *Harri*
does not agree with the government's interpretation o
Court's ruling in *Levine* that the proceeding wa
open one. Justice Frankfurter's opinion in the *L*
case said that it was *not* a truly open proceeding; bu
the defendent did not object to it at the time. 362 U.
616-619. In the instant case, it was quite clear tha
defendant *did* object to the fact that the proceedings
not public. See Transcript of Record pp. 16, 23, 24, 2
32, 33. The petitioner's counsel and the court an
prosecutor were all well aware that the trial court
proceeding under the rule of the *Brown* and *Levine*
sions, and petitioner's counsel was careful to make p
and timely objections as the *Levine* case suggeste
should.

What occurred in the instant case was exactly what Chief Justice Warren predicted in the *Brown* case would happen should the Government be allowed to convert a Rule 42(b) proceeding into a Rule 42(a) proceeding at will, thus depriving individuals of their constitutional and statutory right to notice and hearing. Agreeing now that petitioner's contempt could have been treated under Rule 42(b), the government argues that the trial court had the right to make petitioner repeat his offense before the court so that the government could suspend petitioner's constitutional rights by proceeding under the more precipitous summary procedures of Rule 42(a). There was no other purpose for this questionable conversion than to sidestep petitioner's procedural protections.

Not only does the government thus urge the defeat of petitioner's constitutional rights at the caprice of the prosecutor or trial judge; it goes on to suggest that such a procedure is really to the petitioner's advantage—whether he likes and wants it or not. For example, on page 23 of the government's brief, it states that there is no reason to believe that the sentence would be harsher in a 42(a) proceeding than in a civil contempt or a Rule 42(b) proceeding. The government thus assumes that the petitioner would have absolutely failed to convince the trial court of any matter in his defense or in extenuation or mitigation, even if there was a full hearing. The government has no right to decide for a defendant how he should proceed, or what is best for him. Yet, this is the gist of the government's argument at page 23 of its brief.

In the instant case, there was a "command performance" in the words of Chief Justice Warren in the *Brown* case—a repeat of a contempt before the Grand Jury in order to convert the proceeding from a Rule 42(b) to a Rule 42(a) proceeding. The government rationalizes this by saying that the court was really being kind to the defendant in trying to use the contempt power as a *coercive* device. This

obviously is not so since petitioner was given a fixed sentence for an alleged consummated wrong. Indeed, in its adjudication, the trial court stated that it was finding petitioner guilty of *criminal* contempt. Record, p. 33. And, the addition of a purge clause does not change a punitive sanction to a coercive one. *Gompers* v. *Bucks Stone & Range Co.*, 221 U.S. 418, at 443.

The government also argues that the record shows that the only real issue before the trial court in the instant case was whether the petitioner had immunity under the Communications Act. Even if this was so, there would have been questions of fact or witnesses upon which such a decision needed to be predicated, and which petitioner could have offered at the Rule 42(b) proceeding. But the petitioner was fobbed-off from his opportunity of stating what issues he was requesting time to prepare for. He asked for the chance to raise other issues and this was denied. Record, p. 32, 33. After that, it is ironical that the government should now say that he had no issues because he only mentioned a few. The fact is that petitioner's counsel asked for a delay to be able to offer more evidence (the nature of which was never fully disclosed because the request was denied) and to advise his client. It is compounding the wrong to the petitioner to argue now that having been stopped from going further in the hearing against his wishes, he should be punished because he did not present evidence which would warrant this Court's now acknowledging that there *were* further issues to be raised.

The government also argues at page 65 of its brief that in a case of disobedience of an order there is not that danger of personal bias on the part of the court with which Rule 42(b) is concerned. Although this is not the case of a wrangling between the court and a contemnor (in which case it would be clear that the judge could not be unpredjudiced) it does not mean that there might not be

a great affront on the part of the particular judge who issued the order. See dissent of Justice Black in *Nilva* v. *U. S.*, 352 U.S. 385 (1957). This is especially so in a case (like this one) where the two had met before, where the proceedings had been dragging on and where the court might well have been angry, impatient, or generally affronted by the alleged recalcitrance of the witness. Was this judge the most dispassionate one to rule on the contempt issue? Under the rule of the *Offutt* case (348 U.S. 11), a judge must disqualify himself if he is "personally embroiled." It may well be that a judge under these circumstances could become so "embroiled" if his order was disobeyed and if petitioner persisted in his legal demands which the court considered ill-founded.

The government argues at page 66 of its brief that much of the justification for punishing the kinds of conduct summarily which are allowed by the statute apply in this case. Apparently the government is seeking a reversal of what is clearly the law. Because although there may be similarities, it is quite clear that the summary contempt power is limited to contempts of the kind where the misconduct is a misbehavior in the presence of the court and not disobedience of a court order. The government says at page 69 that "the importance of being able to punish contempt summarily is not significantly different in the case of a recalcitrant witness than it is in the case of the boisterous or insulting attorney, party, witness, or spectator." But the distinction has been made, and it is based on good sound reasons.

The government argues at page 73 of its brief that looking back it appears that "the judge's principal concern was to compel obedience to his order, not to punish petitioner." This kind of afterthought is hard to understand when in fact the court summarily sentenced the petitioner to jail for a year, a confinement usually re-

served in this country for the most serious offenses. He did this without giving petitioner a hearing which would have indicated a good faith interest on the part of the trial court in determining the merits of the case—if in fact the judge was simply interested in having petitioner's testimony.

The government urges that petitioner's counsel never suggested that he had anything to present in extenuation or to offer regarding the sentence practices of other courts. Obviously, the government is referring to Chief Justice Warren's remarks in the *Brown* case that issues like this are what warrant a Rule 42(b) as opposed to Rule 42(a) proceeding. However, if the government admits that hearings on issues like this are proper, it should also acknowledge that the defendant need not be confined in his right to a hearing to these particular issues which Chief Justice Warren suggested. The Chief Justice's suggestions were meant as examples and not as limitations upon the issues which could be raised.

The government argues that if compliance with court orders regarding Grand Jury testimony could only be obtained at the expense of a *cumbersome full-dress* trial that the Grand Jury's investigatory power would be impaired. Indeed, this is the same argument which has been made about the full protections of all constitutional guarantees. All are awkward and cumbersome in terms of fast, expeditious convictions. Their values all lie elsewhere. Moreover, in this case only the briefest delay would have been necessary. It is hard to imagine how a delay of a few days to allow a defendant to study the law, converse with his attorney, secure witnesses and generally examine his alternatives would defeat the administration of justice. Indeed, it could be argued that it would add to the dignity of justice to act with such regard for the rights of individuals. Swiftness is not always justice.

The government's arguments throughout its brief indicate that their contentions are matters of hindsight and

ingenuity. The government suggests that this criminal contempt sentence was akin to a civil contempt sentence; it suggests that although Rule 42(b) would have been proper that under the circumstances Rule 42(a) was equally as proper; that the disobedience out of the court's presence may be converted to misbehavior in its presence; it suggests that the defendant really had no issues to raise and that the prosecutor and trial court were really looking out for *his* best interests. These arguments are nothing more than afterthoughts and rationalizations to make seem legitimate what was really an improper and unfair procedure on the part of the trial court in this case—procedures which resulted in petitioner being sentenced to a year in jail.

Rule 42(b) is a product of years of consideration by this Court; it emanates from the opinions of former Justice Harlan in *Ex Parte Terry,* 128 U.S. 289 and Chief Justice Taft in *Cooke* v. *U. S.,* 267 U.S. 517. The Rule should be, in the words of Mr. Justice Clark when he was Attorney General and the Rules were promulgated, followed solemnly "with the full measure of life and spirit which the framers intended to impart." Notes and Proceedings of the Federal Rules of Criminal Procedure (1946).

2. In its brief, the government rationalizes and suggests approval of the sentence in this case on grounds which are unjustifiable, unwise as a matter of policy, and unconstitutional as a matter of law.

The *dictum* and the footnote in the *Barnett* case is no great departure from the trend of American decisions as the government suggests, but is consistent with the historic hesitancy of the Federal courts, and particularly the Supreme Court, in allowing an unrestrained use of the precipitous summary contempt power. Through the years the Supreme Court consistently has commented on the danger of the non-jury trial aspect of the contempt power and suggested caution in the exercise of that summary power. Time and time again, the Federal courts, even

when upholding the summary contempt power, noted the danger and subversive nature of such a power. In the *Sacher* case (343 U.S. 1, 1952), Justice Jackson said that summary punishments must always be regarded with disfavor. In the *Ballantyne* case (237 F.2nd 657, 1956), the fifth circuit court said, "It is abhorent to Anglo-Saxon justice as applied in this country that a man, however, lofty his station or venerated his vestments, should have the power of taking another man's liberty from him. Society has only permitted one exception, a limited right of courts to punish for contempt. But that right has been grudgingly granted, has been held down uniformily to the least possible power adequate to the end proposed." Justice Murphy said in *Fisher* v. *Pace,* 336 U.S. 155 (1948), the contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings, and that its use should be carefully restricted. The first circuit court in the *Farese* case, 209 F.2nd 312 at 315 (1954), said "the grant of summary contempt power . . . is to be grudgingly construed so that the instances where there is no right to a jury trial will be narrowly restricted to the bedrock cases where the concession of drastic power to the courts is necessary to enable them to preserve . . . authority . . . afforded . . . decorum . . ."

Legal commentators have also urged that the summary contempt power is an anomoly in American law and should be restrained. Edward Livingston in his famous work on criminal procedure in 1873 made some classic comments about the dangerous nature of the contempt power. He noted that all rationales for giving courts broad and indefinite contempt powers are based upon necessity, even though the power itself is repugnant to all the fundamental principles of justice applicable to other criminal acts. In response to this claim of necessity, he wrote: "Not one of the oppressive prerogatives of which the crown has been successfully stripped in England but was and is today defended on the plea of necessity. Not one of the attempts

to destroy them but was deemed a hazardous innovation." This same point was emphasized in the Green dissent by Justice Black when he pointed out that necessity as a rationale for the summary contempt power has come to mean expedient rather than indispensable. This loose rationale does not warrant derogation of fundamental constitutional rights.

Livingston's idea about the proper function of contempt is interesting. As a matter of fact, it rather ties in with the 1831 and the present contempt statutes. Livingston said that courts, of course, should have the right of self-defense. But only society as a whole should have the right to punish offenses. A single party should not have the right to punish; only the sovereign should have this power. Thus, though the government body, here the courts, should have a power of self-defense, the power to punish should be exclusively invested in society as a whole and not in its individual departments. He compared contempt cases with the law of assault. Certainly an individual may defend himself, just as a court may summarily deal with interruptions or offenses in its physical presence. But once having defended himself or itself, they cannot go further and punish the assailant other than through the orderly processes of the law. Courts should have the right to dispel interference with the performance of their functions, and the 1831 statute and the present statute gives them that power. But the instant case does not involve such a contempt. Since it does not, there is no need or rationale for a summary punishing action in this case.

At pages 38 and 46 of its brief, the government argues that the draftsmen of the Constitution intended to preserve the power of the courts to punish disobedience summarily and that the colonial statutes bear this out. There is absolutely no proof of this. In fact, Justice Black asked the government for proof of this assertion during the argument in the *Green* case (*Green* v. *U. S.*, 356 U.S. 165

at 207). The government could offer none. It cannot now. See 57 Michigan Law Review 258, at 262 (1958). The government offers no proof of its historical conclusion, but simply makes the bald statement as if it were so. In fact it has been pointed out in one text on this subject that exceptions to the constitutional right to trial by jury were specifically enumerated in Article III of the Constitution and contempt was *not* one of the enumerated exceptions. Also, since contempt is not one of the enumerated powers granted to the courts or Congress either, but is implied, the argument is strengthened that the general right to trial by jury ought to apply to contempts. Goldfarb, *The Contempt Power,* p. 174.

The right to a trial by jury for all crimes except impeachment was put in the early part of the Constitution and reflected the strong feelings at the time of our nation's birth that the right to trial by jury was essential. Indeed, in his study of the jury, Lesser tells us that the deprivation of this particular right was one of the serious grievances which the Americans had against the King. Lesser, The History of the Jury System; Journals of the Continental Congress 1778-79 at 69.

It was pointed out in *U. S.* v. *Ballantyne,* 237 F.2nd 657 at 667 (5 Cir. 1956), that: "The history which gave rise to the constitutional provisions guaranteeing the rights of trial by jury is succinctly summarized in the Declaration of Independence in which complaint was made that the colonies were deprived 'in many cases of the benefits of trial by jury.' The Constitution provides the trial of all crimes . . . shall be by jury . . . but those fresh from experiences with tyranny were not content with this general guarantee and Amendments VI and VII were promptly adopted, the former providing in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." This the court went on to say "indicates a determination to afford the right of

trial by jury to those subjected to prosecution *of any sort* which might result in fine or imprisonment. The selection of the language of the Sixth Amendment is hardly explainable upon any other postulate." (Emphasis added.)

The government rationalizes the denial of traditional constitutional jury trial guarantees on the ground that the courts' use of a summary power will aid certain liberal causes. The government argues in a footnote at pages 72 and 73 of its brief that the jury's classic power to nullify the law where it feels that is proper may have a basic function in our philosophy of the criminal law; but that the same is not true of court orders. "Enforcement cannot be made to hinge in such cases on the popular concensus reflected in a jury verdict" the government alleges. This is the suggestion of a very shocking notion —that the sovereign should have absolute powers, and that those powers which derive from the people need not be sanctioned by the people. It is a whose-ox-is-gored philosophy which in effect allows juries to convict and acquit as they see fit in cases generally, but if the government does not like the fact that they are acquitting in certain cases that those cases can be withdrawn from the general constitutional protections. Petitioner suggests that this kind of power would be the beginning of a long-term loss because it is an autocratic tactic. Courts should be careful not to allow such incursions into civil liberties based on the passions or needs of the moment.

It could be argued that most particularly in contempt cases the jury has a valuable role and a necessary function. It brings the public's attention and interest to a dispute which is ordinarily an official governmental one. It brings public enlightenment of the processes of government through the jury representation which has been characterized by Justice Frankfurter as an "indispensable element to the popular vindication of the criminal law." More importantly the jury may serve as an insulation between

the alleged offender and the offended party who is judge, jury, victim and sentencer. Thus, it would add a conservative deliberative element to an otherwise unlimited power. Moreover, the jury would add an element of legitimacy to a contempt proceeding. The public might look with skepticism upon a judicial process that allows one man to be judge, prosecutor, sentencer and jury. But, as Justice Black has aptly pointed out, there is inclined to be less false martyrdom where a jury convicts. And, a jury trial gives a better record for the purposes of appeal.

As a basis for its contentions, the government reverts to the old-saw euphemism that contempt is "*sui generis.*" But the summary contempt power as it is commonly used today, and as it was used in the instant case, is the extraordinary and unorthodox exercise of criminal law powers to punish crime without the protections constitutionally guaranteed to alleged criminals. And there *is* authority for dealing with contempt as a crime.

Justice Holmes in the *Gompers* case (233 U.S. 604, at 610-1913), said "These contempts are infractions of law visited with the punishment as such. If such acts are not criminal we are in error as to the most fundamental characteristic of crime as that word has been understood in English speech. *So truly are they crimes that it seems to be proved that in the early laws they were punished only by the usual procedure.* But, at least in England, it seems that they may be and preferably are tried in that way." (Emphasis added.)

Nonetheless, contempt has been traditionally classified one way for one purpose and another way for another purpose. Even with regard to the Sixth Amendment, contempt has been considered a crime for the purposes of the statute of limitations (*Gompers* v. *Buck Stone & Range Co.*, 221 U.S. 418 (1911); *Gompers* v. *U. S.*, 233 U.S. 604 (1914); *Pendergast* v. *U. S.*, 317 U.S. 412) but not for the purpose of applying the venue guarantee (*Myers* v. *U. S.*, 264 U.S.

95). This *ad hoc* treatment is all too typical and all too troublesome.

Contempt is a crime for purposes of the pardon power. *Ex Parte Grossman*, 276 U.S. 87 (1925). As long ago as 1917, a federal court ruled that a criminal contemnor should be classified as a convict. *Creekmore* v. *U. S.*, 237 Fed. 743 (8th Cir. 1916). And in 1874, the Supreme Court held that contempt of court is a specific criminal offense and the fine therefor is a criminal judgment. *New Orleans* v. *Steamship Company*, 87 U.S. 387 at 392 (1874). Contempt also has been treated as a crime for the purposes of the right to counsel and to compulsory process, *Gompers* v. *Buck Stone & Range Co.* and *Gompers* v. *U. S., supra; Cooke* v. *U. S.*, 267 U.S. 517 (1926); and for the purpose of the requirement for proof of the offense, *Gompers* case, *supra*. The present Federal statutes state that a defendant is entitled to a trial by jury where an act of contempt simultaneously constitutes another crime. Rule 42(b), and 18 U.S.C. 3691. In other words, an act of contempt may also be perjury; it may be bribery; it may be obstruction of justice. For all these cases there will be a trial by jury. Yet we still hang on to the lingering, vestigial and inappropriate rule that contempt itself is still *sui generis* and can be dealt with specially. We are inching closer and closer, through cases and through legislation, to the realization that this fiction is not so. This case gives this Court an opportunity to strike the *coup de grace* to what is nothing but a remaining dangling anachronism.

The trend in the courts and in Congress is away from the old English and early American rule that there is no trial by jury for contempts. See Goldfarb and Kurzman, Civil Rights v. Civil Liberties—the Jury Trial Issue, 12 U.C.L.A. 486 (1965); 18 U.S.C. 3691, 18 U.S.C. 3692; 18 U.S.C. 402; 71 Stat. 637-38; 42 U.S.C. 1971(e), 1995; The Landrum-Griffin Act of 1959; The Civil Rights Act of

1964 (Congressional Record, daily ed., June 9, 1964 at 12611, 12630, 12653). This Court should not follow the government's suggestion to return to days of yore when personal liberty did not enjoy the place of prominence in society which it does today. This Court should seize the opportunity offered by this case to affirm the rule of the *Barnett* case; the message of that case should not be reversed or cancelled.

The government's brief discloses a misconception of the meaning of the Court's *dictum* and footnote in the *Barnett* case and of the basis of Justice Goldberg's dissent in that case.

The majority opinion in *Barnett* held merely that Barnett was not entitled *as a matter of right* to a jury trial. But the majority also recognized there that in view of the gravity of recent sentences being meted out in summary contempt cases, and in view of the opinions of certain members of the Court that, irrespective of the nature of the offense, the nature of the sentence may warrant a jury trial in some contempt cases (a matter not raised in the certification in the *Barnett* case), a defendant is entitled to the benefit of a jury trial if the sentence exceeds that provided for petty offenses. Petitioner interprets this *dictum* as indicating at a minimum that the present Court would not adopt the majority view in the Green case (which prevailed until Barnett) but that if the Court would not grant jury trials as a matter of right the Court *would* grant a jury trial if the sentence exceeded six months (the clear implication of the *Barnett dictum* in the footnote). The majority in *Barnett* included this *dictum* because "in view of the impending contempt hearing, effective administration of justice requires that this dictum be added." The Fifth Circuit dismissed the case on the remand and never reached the issue of the right to jury trial should its sentence have exceeded six months. That issue is now clearly before this Court in the instant case and in several other

federal cases now pending at various stages of appeal. *U. S.* v. *Shillitani*, 345 F.2d 290 (2 Cir. 1965); *U. S.* v. *Castaldi*, 338 F.2d 883 (2 Cir. 1964); *U. S.* v. *Tramunti*, 343 F.2d 548 (2 Cir. 1965); *U. S.* v. *Pappadio*, 346 F.2d 205 (2 Cir. 1965).

At pages 58 and 59 of its brief, the government argues that the *Barnett* rule (that right to jury trial is based on the severity of the sentence and not the seriousness of the offense) is inconsistent with prior decisions. However, the government fails to realize that the *dictum* in the *Barnett* case sets out a test which is not one of definition but rather is one of limitation. The *Barnett dictum* and footnote does not define what contempt is, or what is a petty offense; it merely limits the power of courts to deal with certain offenses by restricting the amount of sentence which can be adjudged without a jury.

In its argument the government cites the *Clawans* case (300 U.S. 617). Yet, the *Clawans* case clearly states that it *is* proper in considering the nature of an offense to look at the allowable punishment for that offense. Indeed, this has been the classic rule. The government also cites the *Shipp* case (195 U.S. 65). But in the *Shipp* case too it was stated that the amount of punishment, as well as the nature of the offense, determines the classification of the offense as petty or not.

The government states at page 24 of its brief that its fundamental position is that the *dictum* in the *Barnett* case rests upon erroneous premises. This remark defines quite clearly the issue before this Court because the petitioner's fundamental position is that the *dictum* in the *Barnett* case is wise, reasonable, correct, clear and rests upon stronger premises than all of the law before *Barnett*. Indeed, at page 26 of its brief, the government suggests that footnote 12 of the *Barnett* case is supported neither by constitutional history nor sound policy. One wonders who is petitioner in this case. In effect, really, the law that this Court has to apply is the law of the

Barnett case. And the government is in effect asking for a reversal of the clear implications of that case. (The petitioner, facing a year in prison, argues merely that this Court should uphold its last ruling on this issue.) The *Barnett* case was a sensible construction of history. The government spends much of its brief attempting to show that the interpretation of history in *Barnett* was not true one hundred percent of the time; but the Court and any student of the contempt power knows that all aspects of the law of contempt are, if anything, uncertain and inconsistent. The government's argument seems to be that whatever uncertainty and inconsistency now exists should accrue to its benefit.

The government complains in its brief at page 27 that as a result of the *Barnett dictum,* a contempt case in which a judge wishes to impose a sentence in excess of six months is a criminal prosecution within the protection of the Sixth Amendment and the third article of the Constitution. It then condemns the idea that for constitutional purposes contempts can be distinguished on the basis of the sentence imposed. But the *Barnett* ruling does not distinguish between contempts. It merely set limits on the sentence in contempt cases requiring that they be in conformity with constitutional guarantees. This is no shockingly new notion. A misdemeanor classically has been defined as a crime where a sentence is up to one year. A felony has been defined as a crime where the sentence is over one year. Though awkward, definitions like this have been the means for defininining offenses historically, and still are. See 18 U.S.C. 1. There is no reason why, with regard to petty offenses or contempts, it should not be the same.

The government also argues at pages 63 and 64 of its brief that the decision whether to impanel a jury under the *Barnett* rule must be made in the dark and that this is impracticable. It "distributes a constituional right according to a blind chance." This is not really so. The

evidence and the nature of the case would be known in advance by the prosecutor. It is usually the prosecutor who initiates contempt proceedings; if it is not, the judge will know and will generally ask the prosecutor to act. In any event, the court will know ahead of time whether this is likely to be an aggravated or petty offense, and it will have a basis reasonably ahead of time upon which to decide whether there will be a need for trial by jury. This is the rule Congress has adopted in the Civil Rights Act of 1957. Moreover, the difficulty of "distributing a constitutional right," as the government calls it, is to be preferred to denying it.

The government argues at page 60 of its brief that the independence of the Federal courts would be undermined if the *Barnett* rule was followed. Is is suggested that this is nothing but a bogy which has constantly been raised about reform of all aspects of the contempt law. The government did not petition for a rehearing in the Barnett case. The Federal court system has not collapsed since that time. One can compare the situation in Congress where that institution has ceased to exercise its inherent summary contempt power and has proceeded under statute with trial by jury ever since the mid-1800's. Its dexterity and effectiveness have not been rendered impotent as a result of a limitation, much greater than the limitation of the *Barnett* decision, upon its contempt power. The District of Columbia Circuit Court of Appeals applied a rigorous interpretation of *Barnett* and it has not been undermined. *Rollerson* v. *U.S.*, 343 F. 2d 269 (D.C. Cir. 1964). Also see *Randazzo* v. *U. S.*, 339 F. 2d 79 (5 Cir. 1964) where, without complaint, the Fifth Circuit followed petitioner's construction of the *Barnett dictum.*

The government argues at page 60 of its brief that the rule in the *Barnett dictum,* and in the Goldberg dissent would have a damaging effect "precisely when the need to vindicate a court's authority and to demonstrate its

independence is greatest." In reply, it could be argued that not to follow this rule would be to deny the precious protections of the Bill of Rights when *they* are most needed. Any disruption or delay caused by the invocation and acknowledgement of the exercise of constitutional rights is demanded by the Constitution. There is no constitutional right which does not cause some difficulty to the government. It could be argued in every constitutional case that to grant someone the right not to incriminate himself, not to have coerced confessions beaten out of him, not to be searched or seized unreasonably, to have counsel, *etcetera*, all occasion difficulties cumbersome to the government in the enforcement of its laws and the investigation of its crimes. The answer is that we pay that price to live in a free society.

The government argues in its brief that the satisfactory and proper remedy for excessive summary contempt sentences by trial courts is resort to the appellate process by which the reviewing courts may reduce sentences. This contention is a weak one. First of all, as a practical matter, it is difficult to get an appellate court to reduce or modify the sentence of a trial court. It has been the classic function of the trial court to determine sentence based on facts and circumstances which it peculiarly has before it. Indeed, it is the proper role in the administration of justice for the district court to sentence. Warren Olney, director of the Administrative Office of the United States Courts recently reported to the United States Judicial Conference that the volume of new judicial business has left the federal courts with a record high number of pending cases, and that in the last year the appellate courts were not able to cope with the "flood" of cases. The government's argument in this respect would lead to the aggravation of this condition. Secondly, it could be asked, what kind of right is it which has to be guaranteed only by the appellate courts. In effect, the government's contention in this respect is a parallel to the situation in *Gideon* v.

Wainwright, 372 U.S. 335 (1963). The rule before *Gideon*, was that the appellate courts would reverse convictions where no right to counsel led to prejudice. This Court held in the *Gideon* case that this was obstructive of both the Federal system and the proper administration of justice. There as here, if a person has a constitutional right he has it and it is not a matter of grace for which he must hopefully resort to the possible monitoring of the appellate courts. *Gideon* ended the *ad hoc* approach in right to counsel cases; *Barnett* did the same regarding the right to trial by jury for non-petty offenses.

The government in its brief states that Justice Goldberg's dissenting opinion in *Barnett* rests upon an erroneous premise. And then the government goes on to rest its case on Blackstone's Commentaries. Petitioner believes that it is clear from recent scholarship that Blackstone was quite wrong with regard to his feelings about summary contempt practices—much more so than, according to the government's argument, was Justice Goldberg. See Frankfurter & Landis, 37 Harvard L.R. 1010 (1924).

The Goldberg dissent is done an injustice by the government's brief. Justice Goldberg stated that his review of original authorities convinced him that the history relied on by past decisions of this Court does not justify the relatively recent practice of imposing serious punishment for criminal contempts without a jury trial. He was not talking about the historical mistake which Justice Black referred to in the *Green* case (and which has been commonly recognized—that is, the mistake about the source of the summary contempt power which arose from the *Almon* case). The mistake referred to by Justice Goldberg had to do with the basis for allowing serious punishments for criminal contempt without a jury trial. Criminal contempts sometimes were tried without a jury in colonial times but generally the penalties then were minor. Courts did then and can now punish trivial offenses summarily

with trivial sentences, including contempts. Although this minor sentence qualification may not have been the *rule* under which lower courts have punished petty offenses in trivial ways, it may well have been a substantial reason for which the Supreme Court upheld summary treatment in these cases. This interpretation would tie in with the approach of this Court recognized both by Justice Clark who said in the majority opinion in *Barnett* that "it does appear true that since 1957, the penalties imposed in cases reaching this Court have increased appreciably, and with the opinion of Justice Goldberg in his *Barnett* dissent where he pointed out the isolated instances of long imprisonments for criminal contempts before 1957 and the more frequent examples of this after 1957. This pragmatic recognition was also reflected in the attitude of Justice Black in the *Green* case where he said "I am confident that if there had been any inkling that the Federal courts established under the Constitution could impose heavy penalties as they do now for violation of their sweeping and far-ranging mandates without giving the accused a fair trial by his fellow citizens it would have provoked a storm of protest to put it mildly."

Justice Goldberg also pointed out in his *Barnett* dissent that at the time of the ratification of the Bill of Rights many states had enacted statutes containing specific limitations on the punishments which could be imposed summarily for criminal contempts. These laws were reflective of existing practices and the early decisions. Thus, his syllogism is correct. It goes as follows: At the time of the Constitution, criminal contempts sometimes were tried without a jury but were *generally* punishable by trivial penalties. Petty offenses were also punishable by trivial penalties without a jury trial. Therefore, this history justifies imposition summarily of no more than trivial penalties for criminal contempts. This approach is less the articulation of what the government calls a *wrong rule* than an existential evaluation of the history of

contempt and punishment at those times. In other words, *if in fact criminal contempts in the colonial period were tried without a jury and were given trivial penalties, and if contempts are now punished differently so that they can no longer be deemed petty offenses punishable by trivial penalties, then the right to trial by jury should not be denied on the authority of that history or indeed upon decisions of this Court which relied on that history.*

Power expands to its outer limit. Courts upheld a broad undefined power so long as it was handled in a restrained way. We can see that the power has since grown and has been used in a far different fashion, though it is still rationalized on the same historical basis. But as our experiences change, so also should our rules. The government cannot have it both ways. If the government wants to have a power which is as broad and unrestrained as the colonial contempt power then it should agree to its being used within the same confines. Yet experience has amply shown that this is not now the case. Therefore, it is appropriate for the Supreme Court to fashion a restriction on the lower courts which use this summary power.

Perhaps the disagreement that the government now has with Justice Goldberg's thinking is based on the fact that the government construes the Goldberg dissent as a concept of what the proper rule was. In fact, Justice Goldberg was talking about what the facts were and what present experiences are. The error of the trial court's procedure in the instant case was less an error in the sense of not following the right historic rule about sentencing than a failure to conform with change as indicated by the footnote in the *Barnett* case.

Applying his existential evaluation of the facts of the case, Justice Goldberg would say that where in fact the government treats a man as a criminal, and deals with his act as an ordinary crime, then the constitutional rights that all criminals have should apply. What he was saying then

was only that there were special treatments for contempts because contempts were treated like other petty offenses in colonial times; but they are not treated in this limited sense now. Now, contempts are treated in fact like crimes and therefore there should be no special procedures to cover them. His rule would be, and this comes from his opinion, "... contempts which are punishable as crimes must be tried by a jury." At p. 759 of the Goldberg dissent. Essentially, this is no departure from Justice Black's evaluation in his dissent that "... the idea that persons charged with criminal offenses such as criminal contempt are not charged with 'crimes' is a judicial fiction." At p. 726 of Black dissent.

At page 27 of its brief, the government concedes that there were colonial contempt cases which were tried before a jury but argues that the overwhelming majority of these decisions concerned trivial contempts which were punished with minor fines and that the general rule allowed trial without a jury. The colonists, it is clear from history, were influenced in their contempt practices by the erroneous conclusions of Blackstone. See Fox, Contempt of Court (1927); Frankfurter and Landis, A Study in Separation of Powers, 37 Harvard Law Review 1010 (1924); Nelles & King, Contempt by Publication in the U.S., 28 Columbia Law Review 401, 525 (1928); Donnelly & Goldfarb, Contempt by Publication in the U.S., 24 Modern Law Review 239 (1961). Even so, the colonial courts kept the exercise of their summary contempt powers within reasonable confines so that the issue of sentence was not litigated. Only recently, as this Court has frequently pointed out, has the dimension of sentences provoked judicial questioning of the constitutionality of the modern contempt practice. See opinions of Justices Harlan and Black in the *Green* case, *supra,* of Chief Justice Warren in the *Brown* case *supra,* and of Justices Clark, Goldberg, and Black in *Barnett.* Moreover, the colonists were not the last word in regard to liberties. Even the cases the government cited indicate

that individuals were punished by being put in stocks and by other cruel types of punishments which we would not condone today.

The government argues at page 49 of its brief that its survey indicates that colonial courts not only did not consider themselves bound in serious cases to impose trivial sentences, but, moreover, contempts were punished occasionally with severe penalties. Even if so, one can ask: does this make it right? Is it worthwhile for the government to show how the contempt power was used or abused then to rationalize its more aggravated abuse now?

3. Even if this Court should decide that the sentence in the instant case is constitutionally permissible, this Court may nonetheless decide that petitioner should have been granted a jury trial where he was sentenced to one year's imprisonment. This the Court may do through its supervisory power over the federal courts. In *Offutt* v. *U. S.*, 348 U.S. 11, at 13 (1954), Justice Frankfurter noted "... the importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt."

The supervisory power of the Supreme Court over criminal procedures and the rules of evidence in the Federal system was best articulated by this Court in *McNabb* v. *United States*, 318 U.S. 332 (1942). The Court said that it was unnecessary in that case to reach the constitutional issue.

> For, while the power of this Court to undo convictions in state court is limited to the enforcement of those 'fundamental principles of liberty and justice' which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of constitutional validity. *Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.*

> Such standards are *not satisfied merely by observance of those minimal historic safeguards for securing trial* by reasons which are summarized as 'due process of law' and below which we reach what is really trial by force. (Emphasis added.)

Continuing, this Court said that when the Supreme Court reviews state action, it must give deference to what the state considers will best further its own security in the administration of criminal justice. However, this policy accommodation, necessarily a part of the Federal system, is irrelevant to the formulation and application of proper standards for the enforcement of Federal criminal law in the Federal courts.

> The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In *the exercise of its supervisory authority over the administration of criminal justice in the Federal courts,* this Court has from the very beginning of its history formulated rules of evidence to be applied in Federal criminal prosecutions. And in formulating such rules of evidence for Federal criminal trials *the Court has been guided by considerations of justice not limited to the strict canons of evidenciary relevance.* (Emphasis added.)

And in mentioning when the Supreme Court should exercise this supervisory power, the Court said, "We are not concerned with law enforcement practices except insofar as courts themselves become instruments of law enforcement . . . The history of liberty has largely been the history of observance of procedural safeguards." Interestingly, Justice Frankfurter also said that a conviction based on such misconduct "cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." This attitude, something akin to the doctrine of *Shelley* v. *Kraemer,* 334 U.S. 1 (1947), reflects the disposition of the Supreme Court not to sanction federal courts' upholding misconduct on the ground that, if

they do, the courts themselves become a part of the wrong. It could be argued that in the instant case, the court's misconduct goes even further because the court itself is guilty of procedural misconduct.

The Supreme Court has exercised its supervisory power over the Federal court system in a variety of situations: in the *Nardone* case (308 U.S. 338, 1939), where products of illegal wire taps were admitted in evidence; in the *Marshall* case (360 U.S. 310, 1958), where jurors had read about a defendant's prior record and, after being questioned about this by the Court, were allowed to sit; in the *Elkins* case (364 U.S. 206, 1960), where evidence illegally obtained by state officials was used in a Federal trial; and in the *Bruno* case (308 U.S. 287, 1939), where the trial court refused the request of the defendant to instruct the jury about the defendant's failure to testify. In all these cases, the Supreme Court reversed convictions on the basis of its supervisory power over the lower Federal courts and its ability thereunder to determine rules of evidence and procedure to guide the courts.

Referring to the Court's opinion in the *Nardone* case, Justice Frankfurter said in *McNabb*: "The civilized conduct of criminal trials cannot be confined within mechanical rules." While judges must have discretion in matters before them, our system relies on the learning, good sense, fairness, and courage of the Federal trial judges.

It is not necessary for this Court to sustain its *dictum* in *Barnett*, on constitutional grounds. This Court may uphold petitioner's claim for the right to notice and hearing under Rule 42(b), and for a jury trial if his sentence exceeds six months, predicating its decision upon the Supreme Court's clear and classic power to determine proper procedures to guide the lower Federal courts in their administration of criminal justice and to assure that such procedures are consistent with "minimal historic safeguards" and "civilized standards."

CONCLUSION

For the foregoing reasons and those stated in our opening Brief, we respectfully submit that the judgment of the court of appeals should be reversed.

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